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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

TETYANA NAZARUK,, Plaintiff, v. eBAY, INC.; ACE COINS, Defendants.	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM** Case No. 2:06CV00242 The Honorable Dale A. Kimball

Defendant eBay, Inc. ("eBay") submits this reply memorandum of points and authorities in support of its Motion to Dismiss ("Motion") the action initiated via Plaintiff Tetyana Nazaruk's (the "plaintiff") Complaint filed March 22, 2006 (the "Complaint"), and in response to the plaintiff's Opposition ("Opposition") filed June 15, 2006[1].

[1] On June 9, 2006, plaintiff filed a Motion On/For Court Hearing in which she claims eBay did not file a responsive pleading to her complaint. In fact, on June 6, 2006, eBay filed the present motion seeking dismissal of her claims. Plaintiff filed no memorandum in support of her motion at the time it was filed. Inexplicably on June 15, 2006, however, plaintiff filed a Memorandum in Support of Plaintiff's Complaint and Motion On/For Court Hearing. Her memorandum does not explain the basis of her motion, but rather, is a response to eBay's motion. As such, it is impossible for eBay to respond to plaintiff's motion. eBay submits this reply memorandum in support of its motion. To the extent plaintiff seeks a hearing on her motion or to the extent this Court is inclined to consider the merits of her motion, eBay would like the opportunity to understand plaintiff's position and formally respond to her motion.

I. INTRODUCTION

Since the Opposition fails to address any of the law cited by eBay in its Motion, eBay, for brevity, will not restate the uncontested law detailed in its Motion. The plaintiff's Opposition contains two arguments against dismissal of this Action, both of which can be easily dismissed. First, the plaintiff argues that this case should not be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3) ("Rule 12(b)(3)") because "[t]his civil rights case should be resolved in Utah according to Federal Law." (Opp. at 2). The plaintiff appears concerned that, should this case be dismissed by this Court, her claims will not "be heard and resolved by Federal court, based on Federal Law." (Opp. at 1). But the plaintiff is free to bring their lawsuit in a Federal Court in Santa Clara County.

Second, the plaintiff argues that this case should not be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") because "Plaintiff filed documents, which prove the primarily collusion and cooperation in the ethnic discrimination between EBay inc. and Ace coins [sic]." (Opp. at 2). But even if the plaintiff's allegations were accepted as true (which they are not), her Complaint still must be dismissed as to eBay because eBay: (1) is completely immune from liability for any claims that arise from statements made by third parties (here, acecoins) on eBay's website under Section 230 of the Telecommunications Act of 1996 (47 U.S.C. § 230)[2]; (2) is not a state actor, nor do any of the actions detailed in the Complaint demonstrate that eBay acted under the color of state law, which is a prerequisite to maintaining a 42 U.S.C. § 1983 claim; and (3) did not violate the plaintiff's right to be free from involuntary servitude and her right to interstate travel (nor does the Complaint allege otherwise), which are

[2] For brevity, this statute is referred to herein as "Section 230."

the only two rights protected from private encroachment under 42 U.S.C. § 1985[3].

II. ARGUMENT

A. Civil Rights Cases are Covered Under the User Agreement, Which Allows the Plaintiff to Bring this Action in a Federal Court in Santa Clara County, California.

The plaintiff appears most concerned that should the Court enforce the forum selection clause contained in the eBay User Agreement and dismiss this Action pursuant to Rule 12(b)(3), her claims may not "be heard and resolved by Federal court, based on Federal Law." (Opp. at 1). But the forum selection clause contained in the eBay User Agreement merely provides that any dispute between eBay and one of its users "must be resolved by a court located in Santa Clara County, California." Declaration of Allyson Willoughby, ¶ 4, Ex. A to the Motion. This includes a Federal court. So the plaintiff, under the terms of the eBay User Agreement, will still be allowed to have their claim "heard and resolved" by a Federal Court, based on Federal law.

Second, while the plaintiff appears to be concerned that eBay will be given a "advantage" by "resolving this case in California" (Opp. at 2), this Court has previously rejected such a presumption. *See Zions First Nat'l Bank v. Allen*, 688 F. Supp. 1495, 1499 (D. Utah 1988) (enforcing forum selection clause agreed to by the parties and finding "unpersuasive" the argument that "unsophisticated individuals [the defendants] should not be forced to litigate in a big corporation's home forum.").

Third, the plaintiff argues that the User Agreement does not apply to civil rights cases. (Opp. at 2). But the User Agreement specifically states: "You agree that *any* claim or dispute you may have *against eBay* must be resolved by a court located in Santa Clara County, California." Declaration of Allyson Willoughby, ¶ 4, Ex. A to the Motion (emphasis added).

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[3] For brevity, these statutes are referred to herein as "Section 1983" and "Section 1985."

There is no carve out for "civil rights cases," and eBay is unaware of any case law holding that civil rights cases are not subject to a valid and enforceable forum selection clause.

Fourth, the plaintiff argues that eBay "broke [sic] User Agreement" and that accordingly, the User Agreement is "invalid." (Opp. at 2). This is untrue and irrelevant. The plaintiff may avoid the enforcement of a forum selection clause by showing that enforcement would be unreasonable or unjust, that the clause is the product of fraud or overreaching, or that the forum chosen in the clause is gravely inconvenient. *See M/S/ Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-16 (1972). The plaintiff does not allege any of the above. Instead, the plaintiff asserts that eBay breached the contract, but the plaintiff cannot avoid the enforcement of a forum selection clause by merely alleging a breach of the User Agreement by eBay. To hold otherwise would allow any party seeking to avoid enforcement of a forum selection clause to allege a breach of contract: "If a forum clause were to be rejected whenever a plaintiff asserted a generic claim of fraud in the inducement, as is the case here, then forum clauses would be rendered essentially meaningless. That is, whenever a plaintiff had a breach of contract claim, it could defeat an otherwise clear, detailed, and comprehensive forum selection clause by simply alleging fraud as well. Such a holding would denigrate the Supreme Court's overriding mantra expressed in [*M/S Bremen and Stewart Org.*] that forum selection clauses should not be dismissed lightly." *REO Sales, Inc. v. Prudential Ins. Co. of Am.*, 925 F. Supp. 1491, 1495 (D. Colo. 1996) (enforcing forum selection clause).

Here, the plaintiff has not alleged fraud in the inducement as to the inclusion of the forum selection clause in the User Agreement. And simply alleging a breach of the User Agreement by eBay does not allow the plaintiff to avoid enforcement of the valid forum selection clause maintained therein.

The forum selection clause is valid and enforceable. The plaintiff has not argued that pursuing this Action in a Federal Court located in Santa Clara County, California would be so inconvenient as to defeat a valid forum selection clause. Nor has the plaintiff alleged that there is any bad faith or overreaching or lack of sufficient notice here. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992). The plaintiff also has not argued that the forum selection clause is permissive, and in fact, it is mandatory. As such, the forum selection clause is valid and must be enforced.

B. The Complaint Should Be Dismissed as to eBay Under Rule 12(b)(6).

The plaintiff alleges that this Action should not be dismissed under Rule 12(b)(6) because there is "primarily agreement (collusion) and cooperation in national discrimination issue between EBay inc. and Ace coins, Robert Baganz." (Opp. at 2). Even accepting this allegation as true, which it is not, the plaintiff cannot maintain a civil rights action under Sections 1983 or 1985 based on this allegation, or any of the allegations in the Complaint.

As part of the landmark federal Communications Decency Act (and the Telecommunications Act) of 1996, Congress created an omnibus safe harbor provision for interactive Internet companies such as eBay, immunizing them against liability arising from the third-party information that courses through their websites. *See e.g. Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000) (finding AOL was immune from suit under Section 230 for providing access to allegedly inaccurate information, and holding that, "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party. . . .") (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). eBay is a provider of interactive computer services, and thus qualifies for this protection. *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831, n. 7 (2002). The plaintiff does not dispute any of this.

Additionally, Section 1983 of Title 42 of the United States Code provides individuals with redress for violations of rights "secured by the Constitution and laws of the United States" where the violations are committed under color of state law. *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1207 (10th Cir. 2005) (quotation omitted). Even accepting all the plaintiff's factual allegations as true, the plaintiff's Complaint fails to allege facts sufficient for finding that eBay is a private actor, where eBay (and the other defendant, acecoins) is not an employee of any State or the federal government. The Complaint does not allege, for example, that eBay acted under a right created by the State, or by a rule of conduct imposed by the State, or that the State was responsible for eBay's conduct. The Complaint is simply devoid of any allegation of state conduct here, or of any facts that would support a finding that eBay acted under the color of state law.

The plaintiff's Section 1985(3) claim is also defectively pled. Section 1985(3) only covers private conspiracies aimed at interfering with rights that are protected against private, as well as official, encroachment. *See Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993). The Supreme Court has recognized only two rights as protected against private conspiracies under Section 1985(3): the right to be free from involuntary servitude and the right to interstate travel, both under the Thirteenth Amendment. *Id*. (citation omitted). There is no allegation in the Complaint, nor can there ever be, that eBay has subjected the plaintiff to involuntary servitude or restricted the plaintiff's right to interstate travel. As such, the plaintiff's Section 1985(3) claim necessarily fails, and should be dismissed with prejudice. *See id*. (dismissing complaint for failure to state a cause of action under Section 1985(3) where the plaintiff alleged a violation of his First Amendment rights).

At bottom, the plaintiff's Opposition sheds no additional light on how the plaintiff's claims avoid the application of the legal principles cited by eBay in its Motion, and briefly restated above. This Action is simply miscast as a civil rights claim. As the Complaint details, this is a case about a third party (acecoins) posting allegedly discriminatory statements about the plaintiff on eBay's website. State action, the plaintiff's right to be free from involuntary servitude and to travel between states are not implicated in the plaintiff's Complaint. Accordingly, the plaintiff's Section 1983 and Section 1985 claims fail as a matter of law, and should be dismissed without leave to amend.

III. CONCLUSION

Plaintiff's Complaint as to eBay should be dismissed pursuant to Rule 12(b)(3) based on the forum selection clause in the User Agreement specifying that the plaintiff must bring suit against eBay in Santa Clara County, California. In the alternative, eBay respectfully requests that this Court dismiss the Complaint for failure to state a claim because: (1) eBay is immune under Section 230 for statements posted by third parties on its website; and (2) the plaintiff's Section 1983 and Section 1985 claims are fatally defective.

DATED this 29th of June, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29TH day of June 2006, I mailed a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM**, postage prepaid, to:

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